

DIVISION OF LABOR STANDARDS ENFORCEMENT  
Department of Industrial Relations  
State of California  
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BEFORE THE LABOR COMMISSIONER  
OF THE STATE OF CALIFORNIA

RENAN ALMENDAREZ,

Petitioner,

vs.

UNICO TALENT MANAGEMENT, INC., and  
GERSHON GABEL

Respondent.

Case No. TAC 55-97

DETERMINATION OF  
CONTROVERSY

**INTRODUCTION**

The above-captioned petition was filed on October 23, 1997 by RENAN ALMENDAREZ (hereinafter "Petitioner"), alleging that GERSHON GABEL dba UNICO TALENT MANAGEMENT, INC., (hereinafter "Respondent"), acted as an unlicensed talent agency in violation of Labor Code §1700.5<sup>1</sup>. Petitioner seeks a determination from the Labor Commissioner voiding a 1995 Management Agreement *ab initio*, a 1997 Agreement *ab initio*, and disgorgement of all consideration collected by respondent stemming from either agreement.

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<sup>1</sup> All statutory citations will refer to the California Labor Code unless otherwise specified.

1           Respondent was personally served with a copy of the  
2 petition on November 4, 1997. Respondent filed his answer with  
3 this agency on August 3, 1998. A hearing was scheduled and  
4 commenced before the undersigned attorney, specially designated by  
5 the Labor Commissioner to hear this matter on July 16, 1999, in Los  
6 Angeles, California. Petitioner was represented by Edward N. Sabin  
7 of Greenberg, Glusker, Fields, Claman & Machtinger; Respondent  
8 appeared through his attorneys David R. Lira and Gita Saigal of  
9 Girardi & Keese.

10           After three days of hearing, due consideration having  
11 been given to the testimony, documentary evidence and arguments  
12 presented, the matter was taken under submission on July 20, 1999.  
13 The Labor Commissioner adopts the following determination of  
14 controversy.

15  
16                           **FINDINGS OF FACT**  
17

18           1. In 1995, Renan Almendarez, was employed by radio  
19 station KKHJ as an on-air morning radio personality. Respondent,  
20 Gershon Gable, was a frequent advertiser on KKHJ, benefitting from  
21 petitioner's quickly rising popularity. A friendship developed and  
22 on November 16, 1995, the parties executed a three year "Management  
23 Agreement" (hereinafter "1995 Management Agreement") providing,  
24 *inter alia*, that respondent would counsel and advise petitioner in  
25 all matters pertaining to the entertainment industry and receive as  
26 compensation, 20% commission on petitioner's gross earnings.

27           2. The testimony established respondent, well aware of

1 petitioner's potential to attract a massive audience and uncanny  
2 ability to promote and sell products far in excess of other radio  
3 personalities, promised petitioner that he would make millions in  
4 the radio industry and assured petitioner that through his many  
5 contacts he could obtain for petitioner a far more lucrative job.  
6 On December 11, 1995, petitioner resigned from KKHJ.

7           3.       The "1995 Management Agreement" expressly  
8 maintained, respondent was prohibited from engaging in employment  
9 procurement activities.       Respondent testified his only  
10 responsibility was to guide and counsel petitioner's career, but  
11 that testimony is contradicted by countless documents and unbiased  
12 witness testimony. In short, the evidence leaves little doubt that  
13 respondent's activities during petitioner's fourteen (14) month  
14 unemployment period were performed primarily for obtaining  
15 employment for petitioner. These efforts included the following:

16           a.       Respondent promised petitioner that after the "1995  
17 Management Agreement" was executed, respondent would obtain a  
18 nationally syndicated radio deal for petitioner by, "having the  
19 freedom to negotiate with any radio station."       Respondent  
20 specifically promised petitioner a job by January 20, 1996.

21           b.       On January 8, 1996, respondent issued the following  
22 press release:

23       "Unico Talent Management, Inc., has been retained to  
24 represent Mr. Renan Almendarez Coello, "El Cucuy", L.A.'s  
25 number one Spanish-language morning disc jockey.  
26 Beginning January 29, 1996, Renan will produce the first  
LIVE, Spanish-language, daily morning drive radio program  
for national syndication....[w]ith Renan's track record

1 and current high-profile status, radio station and  
2 network operators from across the United States who are  
3 interested in broadcasting this new program **have**  
4 **initiated negotiation discussions with Unico Talent**  
5 **Management, Inc."**

6 Notwithstanding respondent's prohibition from negotiating  
7 employment contracts, petitioner was unemployed and did not have  
8 the ability to produce a live show. The press release was simply  
9 a ploy to solicit offers from radio station owners in an attempt to  
10 find a home base to launch petitioner's radio show.

11 c. Again, on January 8, 1996, Respondent sent dozens of  
12 letters to radio stations across the country stating in pertinent  
13 part: "we are currently accepting written offers from any station  
14 or station group that would be interested in broadcasting this  
15 program throughout Hispanic U.S. **To submit an offer** or if you have  
16 any questions, please contact us at Unico Talent Management."  
17 Respondent argues, this was an offer for radio stations to receive  
18 his client's show by accessing an existing signal, and not an act  
19 of procuring employment. Again, petitioner did not have a show to  
20 access. This was another attempt at soliciting offers to employ  
21 petitioner. Once petitioner was employed, respondent could  
22 hopefully launch a successful syndication effort.

23 d. In 1995, shortly after representation began, Jim  
24 Kalmenson, General Manager of KWKW, initiated contact with  
25 respondent to employ petitioner. Had Respondent simply turned all  
26 negotiation responsibilities over to petitioner, this in itself,  
27 would not be procuring employment, but Mr. Kalmenson testified that  
he initially negotiated all of the employment terms with

1 respondent, including cars, ratings performance bonus, and salary.

2           The negotiations fell through because respondent  
3 required a very unusual condition precedent before allowing  
4 petitioner to sign with Mr. Kalmenson's station. Any employment  
5 package for petitioner was conditioned upon respondent receiving  
6 from the radio station, a fixed number of free advertising minutes  
7 during petitioner's show, used to advertise respondent's other  
8 business ventures.<sup>2</sup> This very unusual and inflexible employment  
9 provision required by the respondent, persuaded Mr. Kalmenson to  
10 initiate employment opportunities directly with petitioner.  
11 Petitioner refused to sign a contract without respondent's approval  
12 and contract negotiations broke down.<sup>3</sup>

13           e. Similar procurement efforts developed between  
14 petitioner's current employer, Richard Heftel, general manager of  
15 radio station KSCA. Mr. Heftel testified that discussions between  
16 the parties were also conditioned on mandatory advertising minutes  
17 being bestowed upon respondent. When the agreement was executed  
18 between petitioner and KSCA, (hereinafter "Employment Agreement"),  
19 credible testimony reflected respondent negotiated the terms of the  
20 agreement by requesting and receiving various material changes in  
21 petitioner's contract.

22           f. Respondent's own financial advisor, Robert Markus,

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23  
24           <sup>2</sup> Respondent owned and operated a legal referral business.

25           <sup>3</sup> Respondent produced a letter from the petitioner, sent to Mr Kalmenson,  
26 stating petitioner was a "free agent" and could negotiate terms on his own.  
27 Testimony confirmed that the letter was sent at the insistence of respondent.  
Even had petitioner subsequently negotiated his own terms, early negotiations  
were conducted solely by respondent.

1 testified that respondent explicitly told Mr. Markus that he  
2 negotiated the salary, car, ratings bonus and advertising minutes  
3 as part of petitioner's initial employment agreement with KSCA.

4 g. Uncontroverted evidence in the form of "program  
5 agreements" provided by respondent to Mr. Kalmenson and Mr. Heftel  
6 asserted respondent's ability to demand petitioner provide a  
7 reasonable number of personal appearances on behalf of the station  
8 advertisers at rates to be negotiated by respondent.

9 h. Unbiased testimony of radio program producer, Craig  
10 Kichen, reflected respondent conducted all employment negotiations  
11 on behalf of petitioner, culminating in, "Mr. Gabel doing his  
12 important client a real disservice."

13 i. KSCA legal representative, Mr. Michael S. Sherman,  
14 drafted petitioner's "Employment Agreement" and the advertising  
15 minutes agreement between respondent and KSCA (hereinafter "minutes  
16 agreement"). Mr. Sherman credibly testified all negotiations for  
17 these two contracts were conducted with Unico Talent Management's  
18 attorney Mr. Robert Conrad, negotiating on behalf of Unico.  
19 Testimony revealed that Mr. Conrad did not represent petitioner's  
20 interests during these negotiations.

21 Petitioner rarely, if ever, participated in employment  
22 discussions and respondent occupied the primary negotiating role.  
23 Respondent's activities described above constituted illegal  
24 procurement of employment. Additionally, respondent's credibility  
25 was called into question as his testimony was wracked with  
26 inconsistent statements, impeached by prior sworn deposition  
27

1 testimony<sup>4</sup>.

2 4. Between December 11, 1995, and February 4, 1997,  
3 petitioner was unemployed and without income. Respondent knowing  
4 Mr. Almendarez would eventually pay large dividends and eager to  
5 keep his artist happy, arranged to have petitioner's living  
6 expenses met. In fact, throughout 1996, respondent paid  
7 petitioner's credit cards, child support, children's schooling and  
8 legal expenses from litigation arising from his KKHJ resignation.  
9 Respondent also provided petitioner with hotels, a home, vehicles  
10 for petitioner and his wife, monies to petitioner's morning show  
11 crew, monthly cash, vacations and at least once, a bag containing  
12 \$50,000.00 in cash. Respondent alleges over \$657,202.00 was  
13 advanced.

14 5. After fourteen months of respondent attempting to  
15 procure employment for the petitioner, coupled with KSCA's desire  
16 to employ the very popular radio personality, KSCA succumbed to  
17 respondent's request for free advertisement minutes as part of the  
18 employment deal. This resulted in the February 4, 1997 "employment  
19 agreement" between KSCA and petitioner. Simultaneously, respondent  
20 entered into the aforementioned "minutes agreement" with KSCA,  
21 whereby respondent was provided a specific number of free  
22  
23

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24 <sup>4</sup> Both respondent and petitioner were impeached often by inconsistent  
25 statements casting credibility questions upon both parties. It was pointed out  
26 numerous times on cross-examination, Respondent's answers under oath would  
27 contradict prior sworn deposition testimony. Petitioner testified he spoke no  
English, and it was later discovered petitioner passed a driver's license test  
written in English. Additionally, petitioner characterized the "1997 Agreement"  
as a loan and later recanted his testimony under oath.

1 advertising minutes per hour on stations KSCA and KTNQ.<sup>5</sup>

2 6. Petitioner finally employed, was ostensibly in debt  
3 for the \$657,000.00 advance, and the 20% commissions owed to  
4 respondent pursuant to the "1995 Management Agreement".<sup>6</sup> On May 16,  
5 1997, respondent entered into a loan repayment schedule with  
6 petitioner, (hereinafter "1997 Agreement"). This repayment schedule  
7 provided that petitioner would obtain<sup>7</sup> advertising minutes for  
8 respondent. These minutes were given a monthly monetary value  
9 calculated for reducing the debt<sup>8</sup>. The "1997 Agreement" also  
10 contained a provision which allowed the respondent to use the  
11

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12 <sup>5</sup> Section 1(a) of the "Minutes Agreement" between the respondent and  
13 petitioner's employer states in pertinent part: "[W]e shall make available, or  
14 shall cause to be made available, to you during each day, Monday through  
15 Saturday, six (6) sixty second (:60) spots (each, a "Spot") for the broadcast of  
Spanish language radio commercials (each, a "Commercial") on our radio stations  
in the Los Angeles TSA (as defined by Arbitron) under the call letters KTNQ and  
KSCA during the hours of 5 a.m. until 12 noon each broadcast day."

16 <sup>6</sup> Throughout the hearing, respondent testified the 20% commission was not  
17 part of petitioner's loan repayment schedule. In fact, respondent did not make  
18 a claim for the commissions. To do otherwise could effectively void the  
lucrative 1997 loan agreement between the parties as a modification of an illegal  
contract.

19 <sup>7</sup> Section 1 of the "1997 Agreement" contained a provision that petitioner  
20 would "obtain for and provide to Unico" advertising minutes in consideration for  
21 reduction of the debt. The contract does not specifically state how petitioner  
22 would "obtain" these minutes. In fact, the minutes in issue were already  
23 negotiated and obtained by respondent as reflected in the "Minutes Agreement"  
between respondent and KSCA. The contract provision, on it's face doesn't make  
sense. It purports that somehow the minutes negotiated by respondent in February  
of 1997 from KSCA are to be transferred to the "1997 Agreement" and credited  
against petitioner's debt. The relationship between these two agreements is  
vague at best. Neither side produced evidence to clear up this gap.

24 <sup>8</sup> The "1997 Agreement" established that petitioner would be given a  
25 credit against his debt in the amount of \$7,000.00 per month no matter what the  
26 true value of the commercial time provided to respondent. An accounting of the  
minutes received, divided into \$7,000.00, revealed a \$44.00 value for each minute  
credited against the petitioner's debt. Testimony reflected the fair market  
value of advertising minutes during petitioner's show to be between \$300.00 and  
\$1,000.00.



1 signature, name, person, likeness, voice, biography, performance,  
2 picture and photograph of petitioner..., to market and sell any  
3 product in all commercials aired during the commercial time.

4           7. Throughout 1997, respondent collected an estimated  
5 2,000 minutes of free advertising time during petitioner's show.  
6 Testimony reflected the cumulative value of these advertising  
7 minutes ranged from \$600,000.00 to \$2,000,000.00. The petitioner  
8 claims he did not understand the terms of this "1997 Agreement",  
9 until he was provided with a Spanish translation of the document.  
10 It was only then petitioner realized the contents of the "1997  
11 Agreement" contained an unconscionable repayment schedule.  
12 Petitioner immediately sought independent counsel and quickly  
13 severed the management relationship and filed this petition to  
14 determine controversy, seeking disgorgement for the value of the  
15 minutes received by respondent as an illegal collection of  
16 commissions upon a contract void as to public policy.

17           8. Respondent then filed a superior court action for  
18 breach of the "1997 Agreement" seeking damages. Petitioner moved  
19 the superior court seeking an order staying the superior court  
20 action pending the determination of the Labor Commissioner's Talent  
21 Agent Controversy. On May 28, 1998, that motion was denied. The  
22 superior court reasoned the "1997 Agreement" was a loan agreement  
23 containing a severability clause not subject to the Labor  
24 Commissioner's jurisdiction, thus still enforceable. Respondent  
25 then applied to the superior court for Right to Attach Order and  
26 Order for Issuance of Writ of Attachment. On October 15, 1998,  
27 that application was granted.

1           9. The central issue in this case turns on whether the  
2 "1997 Agreement" shall be construed as a loan repayment agreement  
3 or a commission modification to the "1995 Management Agreement".  
4 The respondent alleges the \$657,202.00 advance was a loan  
5 understood by the petitioner and the "1997 Agreement" was simply a  
6 memorialization of an oral agreement between the parties on how the  
7 \$657,202.00 advances were to be repaid. The petitioner argues, the  
8 "1997 Agreement" is simply an amendment or modification to the 20%  
9 commission structure provided for respondent in the original "1995  
10 Management Agreement"<sup>9</sup>. If the "1997 Agreement" is ruled a separate  
11 and distinct loan repayment contract, this would effectively divest  
12 the Labor commissioner of jurisdiction. Alternatively, if the  
13 "1997 Agreement" is considered an amendment or modification of the  
14 illegal "1995 Management Agreement", the effect would be a  
15 modification of an illegal contract. Of course, that modification  
16 must also be void, and any profits earned through the modification  
17 must be disgorged by the respondent.

18  
19                   **"1997 AGREEMENT" IN LIEU OF COMMISSIONS**

20           10. The advertising minutes that respondent received  
21 from KSCA and KTNQ were provided as a substitute to the 20%  
22 commission provision contained within the "1995 Management  
23 Agreement" evidenced by the following:

24 \_\_\_\_\_  
25           <sup>9</sup> Section 5(a) of the 1995 management agreement reads, "In consideration  
26 of the services rendered by Company to you hereunder, you hereby irrevocably  
27 assign to Company, and you shall pay to Company, as and when received by you or  
applied in your behalf, a sum equivalent to twenty (20%) percent of your Gross  
Compensation (the 'Fee')".

1           a. Established through the testimony of Mr. Heftel, Mr.  
2 Kalmenson, Mr. Kichen, Mr. Sherman and Mr. Markus, the respondent  
3 pre-determined that employment of his client would be conditioned  
4 upon respondent receiving aforementioned advertising minutes.  
5 Respondent, well aware that the value of free advertising  
6 considerably outweighed the 20% commission he would receive  
7 pursuant to the express terms of the "1995 management agreement",  
8 negotiated for minutes with petitioner's employer as direct  
9 compensation for his management efforts. Not once did respondent  
10 consider an employment agreement for his client without procuring  
11 advertising minutes.

12           b. Richard Heftel testified that prior to the execution  
13 of petitioner's "employment agreement" with KSCA, Mr. Heftel had  
14 offered respondent \$250,000.00 for petitioner with a \$250,000.00  
15 bonus schedule. Respondent disregarded this offer stating, "you  
16 are not in the right ballpark". Eventually the actual employment  
17 agreement contained only a \$150,000.00 salary, a bonus schedule<sup>10</sup>,  
18 and 2,000 minutes of advertising for the respondent. This clear  
19 breach of fiduciary duty displayed not only respondent's self  
20 dealing, but more importantly, reflected respondent's intent to  
21 collect advertising minutes in lieu of commissions.

22           c. Mr. Sherman testified, and the "minutes agreement"  
23 between respondent and KSCA expressly reflected, the minutes given  
24 are in lieu of any 20% commissions structure previously

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25  
26           <sup>10</sup> For each book, petitioner could receive between \$10,000.00 and  
27 \$100,000.00 bonus depending on his market share.

1 negotiated.<sup>11</sup>

2 d. Mr. Gabel's own financial advisor, Mr. Kichen, also  
3 testified the minutes negotiated would be received in lieu of  
4 commissions. In short, respondent knew all along that his profits  
5 for management services would be derived from free advertising.  
6

7 **"1997 AGREEMENT" DESIGNATED A LOAN**

8 11. Designating the "1997 Agreement" as a modification  
9 of the "1995 Management Agreement" does not end the analysis.  
10 Respondent's argument that the "1997 Agreement" is a valid loan  
11 agreement must also be considered.

12 12. Testimony reflected the petitioner was well aware  
13 the expenses advanced by respondent were not a gift and would be  
14 repaid. Petitioner testified that he questioned the respondent  
15 about the 657,202.00, and respondent stated, "just sign this and  
16 you wont owe us the 20% or anything. All you have to do is give me  
17 your voice." It is clear, prior to signing this "1997 Agreement"  
18 petitioner was well aware that this would extinguish all debt to  
19 the respondent including advances and commissions. Testimony also  
20 reflected he took the "1997 Agreement" home to his wife, who  
21 examined and supported his decision to sign it. The petitioner  
22 initialed provisions throughout the contract, signed it, dated it.

23 13. There was considerable testimony on behalf of the  
24 petitioner, that respondent utilized his superior bargaining power  
25

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26 <sup>11</sup> Section 2(a)(i) of the "minutes Agreement" states in pertinent part:  
27 "[T]he advertising time to be provided to you hereunder is in full and complete  
satisfaction of any obligation to you that Coello might have to compensate you  
in connection with the Coello Agreement ["Employment Agreement"] other than as  
it may be extended beyond the current one (1) year term thereof;"

1 to deceive the petitioner into signing this document. The  
2 petitioner went to great lengths establishing he spoke little or no  
3 English and didn't understand the "1997 Agreement". The evidence  
4 contrasted petitioner's story. The petitioner has lived in the  
5 United States since 1982. He is an intelligent, savvy individual,  
6 well experienced in complex business affairs, who on many occasions  
7 signed important documents that were only afforded to him in  
8 English without Spanish translation. The petitioner must not be  
9 allowed to hide behind an immigrant status to avoid repayment  
10 obligations. Though respondent breached his fiduciary duty,  
11 negotiated his clients employment contract for his own selfish  
12 interests and violated the Talent Agencies Act, he also allowed the  
13 petitioner, his wife and children, and his "Tropa Loca", the luxury  
14 to continue as productive citizens in society by providing for all  
15 of life's necessities. Indeed, the petitioner maintained a lavish  
16 lifestyle throughout his unemployment period through the generosity  
17 of the respondent. In short, the petitioner must be held  
18 responsible for the agreement's contents.

#### 19 20 CONCLUSIONS OF LAW

21  
22 1. Labor Code §1700.4(b) defines "artists"

23 "Artists' means actors and actresses rendering services  
24 on the legitimate stage in the production of motion  
25 pictures, **radio artists**, musical artists...and other  
artists **and persons** rendering professional services in  
motion picture, theatrical, radio, television and other  
entertainment enterprises."

26 2. Labor Code §1700 defines "person" as:

27 "any individual, **company**, society, firm, partnership,  
association, corporation, limited liability company,

1 manager, or their agents or employees"

2 3. Petitioner does not perform his show alone. He  
3 regularly performs with other individuals who assist petitioner in  
4 his jokes, skits, and interviews, aptly named "Tropa Loca".  
5 Respondent argues that because petitioner works with a crew, he is  
6 not an artist within the meaning of §1700.4(b). Respondent  
7 rationalizes that the definition is meant only to encompass  
8 individuals and not a "radio production" which is not expressly  
9 contained in the definition of "artist". Notwithstanding the  
10 definition of "artist" includes "company", "[t]he Act<sup>12</sup> is a remedial  
11 statute...Consequently the Act should be liberally construed to  
12 promote the general object sought to be accomplished. Waisbren v.  
13 Peppercorn 41 Cal.App.4<sup>th</sup> 246 at 254. Petitioner is clearly the  
14 artist and it is petitioner's talents, name and likeness that  
15 provide the popularity surrounding the show. His morning crew are  
16 simply "sidekicks". To exempt an artist from the definition of  
17 §1700.4(b), on the basis that he works regularly with others, would  
18 render countless artists without protection, allow violations to go  
19 unremedied, fly in the face of legislative intent and undermine the  
20 protective mechanisms of the Act. Petitioner is an "artist" within  
21 the meaning of §1700.4(b).

22 4. The Labor Commissioner has jurisdiction to hear and  
23 determine controversies, arising between an artist and an agent,  
24 pursuant to Labor Code section 1700.44(a). Indeed, the Labor  
25 Commissioner has primary and exclusive jurisdiction to hear matters

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26  
27 <sup>12</sup> The "Act" refers to the "Talent Agencies Act", Labor Code §§1700  
through 1700.47 et. seq., regulating talent agencies and creating protection for  
those artists seeking employment.

1 arising under the Talent Agencies Act. Buchwald v. Superior Court  
2 (1967) [the Labor Commissioner has "original jurisdiction, to the  
3 exclusion of the superior court, over controversies" arising under  
4 the Act.]

5           5. Respondent maintains he never acted as a talent  
6 agent. Labor Code §1700.40(a) defines "talent agency" as: "a  
7 person or corporation who engages in the occupation of procuring,  
8 offering, promising, or attempting to procure employment or  
9 engagements for an artist or artists." In Waisbren v. Peppercorn  
10 Production, Inc (1995) 41 Cal.App.4th 246, the court held that any  
11 single act of procuring employment subjects the agent to the Talent  
12 Agencies Act's licensing requirements, thereby upholding the Labor  
13 Commissioner's long standing interpretation that a license is  
14 required for any procurement activities, no matter how incidental  
15 such activities are to the agent's business as a whole. The term  
16 "procure", as used in this statute, means to get possession of:  
17 obtain, acquire, to cause to happen or be done: bring about."  
18 Wachs v. Curry (1993) 13 Cal.App.4th 616, 628. Thus "procuring  
19 employment" under the statute includes negotiating for employment,  
20 and entering into discussions regarding employment contractual  
21 terms with a prospective employer, all of which were engaged in by  
22 the respondent. Applying Waisbren, it is clear respondent acted  
23 as a talent agency within the meaning of Labor Code §1700.4(a).

24           6. Labor Code section 1700.5 provides that "no person  
25 shall engage in or carry on the occupation of a talent agency  
26 without first procuring a license therefor from the Labor  
27 Commissioner." It was stipulated the respondent has never been a

1 licensed talent agent.

2  
3 **"1995 MANAGEMENT AGREEMENT"**

4 7. "Since the clear object of the Act is to prevent  
5 improper persons from becoming [talent agents] and to regulate such  
6 activity for the protection of the public, a contract between and  
7 unlicensed agent and an artist is void." Buchwald v. Superior  
8 Court supra.; Waisbren v. Peppercorn supra, at 261. Under Civil  
9 Code section 1667, contracts that are contrary to express statutes  
10 or public policy as set forth in statutes are illegal contracts and  
11 the illegality voids the entire contract. The evidence does not  
12 leave a doubt that respondent procured employment for his artist  
13 without possessing a talent agency license. Therefore, the "1995  
14 Management Agreement" between the parties must fall.

15  
16 **"1997 AGREEMENT"**

17 8. In determining the legal significance of the "1997  
18 Agreement" and it's relationship to the "1995 Management Agreement",  
19 we must discern the intent of the parties by examining extrinsic  
20 evidence. Understanding all of the circumstances surrounding the  
21 advances, the commission scheme and the relationship between the  
22 parties is crucial in determining the parties' intent with respect  
23 to the "1997 Agreement". The California Civil Code states, "a  
24 contract may be explained by reference to the circumstances under  
25 which it was made, and the matter to which it relates. C.C. §1657

26 9. The "1997 Agreement", drafted by respondent's counsel,  
27 seems to be a clear loan repayment schedule for monies advanced to



1 the petitioner. The contract looks valid on it's face and appears  
2 to be an integrated agreement reflecting the true intent of the  
3 parties. Under general rules of contract interpretation, where the  
4 language of a contract is clear and not absurd, it will be  
5 followed. *Civil Code 1638* Similarly, it is said that the rules of  
6 interpretation of written contracts are for the purpose of  
7 ascertaining the words used therein [and] evidence cannot be  
8 admitted to show intention independent of the instrument. Barnhart  
9 Aircraft v. Preston (1931) 212 C. 19, 22. As the superior court  
10 held, absent extraordinary circumstances, this contract should be  
11 left intact.

12           10. However, if it is shown that the words were used to  
13 conceal rather than to express the true intent of the parties, the  
14 court will look through the form over substance. *Witkin, Summary of*  
15 *California Law, 9<sup>th</sup> Ed. Vol. 1 §684*. In the case at bar, the true  
16 intent of the parties was established by careful examination of all  
17 the extrinsic evidence produced at the hearing. *Witkin §681*  
18 states, "[w]here extrinsic evidence has been properly admitted and  
19 the evidence is in conflict, [with the contract] any reasonable  
20 construction by the trial judge will be upheld under the general  
21 rule of conflicting evidence." The Labor Commissioner proceedings  
22 are not governed by traditional rules of evidence or judicial  
23 procedure, and thus most relevant evidence will be admitted. *Title*  
24 *8 California Code of Regulation §12031* After examination of all  
25 relevant evidence submitted at the hearing, it is clear that even  
26 though the document omitted a provision expressly providing the  
27 agreement was to encompass commission owed, both parties understood

1 and intended the "1997 Agreement" to extinguish all of petitioner's  
2 debt, including commissions.

3           11.. Further, if respondent's argument was to be  
4 believed, then he never intended to be compensated for his  
5 management efforts. "Acts of the parties, subsequent to the  
6 execution of the contract and before any controversy has arisen as  
7 to its effect, may be looked to in determining the meaning. The  
8 conduct of the parties may be, in effect, a *practical construction*  
9 thereof, for they are probably least likely to be mistaken as to  
10 the intent." *Witkin, supra* §689. "This rule of practical  
11 construction is predicated on the common sense concept that  
12 'actions speak louder than words.' Words are frequently but an  
13 imperfect medium to convey thought and intention. When the parties  
14 to a contract perform under it and demonstrate by their conduct  
15 that they knew what they were talking about the courts should  
16 enforce that intent. Crestview Cemetery Assn. v. Dieden (1960) 54  
17 C.2d 744, 754. Common sense dictates that the respondent would be  
18 compensated for his efforts on behalf of his artist. There was no  
19 evidence presented that respondent received any form of  
20 compensation other than the ad minutes. Had evidence been  
21 presented, an argument may exist that the "1997 Agreement" was not  
22 partially created for respondent's payment for services in lieu of  
23 commissions. That evidence was not produced and there can be no  
24 other logical conclusion. Through careful drafting of the  
25 contract, specifically the omission of this material term,  
26 respondent has dramatically changed the legal significance of the  
27 document. With the aid of parole evidence, it is clear the

1 repayment terms contained within the "1997 Agreement" include  
2 payment in lieu of commissions stemming from the original "1995  
3 Management Agreement".

#### 4 5 SEVERABILITY

6 12. To uphold the contract as written would produce an  
7 inequitable result. It is the role of the hearing officer to look  
8 to the intent of the parties and to produce that desired result if  
9 possible. Labor Code §1700.23 provides that the Labor Commissioner  
10 is vested with jurisdiction over "any controversy between the  
11 artist and the talent agency relating to the terms of the  
12 contract," and the Labor Commissioner's jurisdiction has been held  
13 to include the resolution of contract claims brought by artist or  
14 agents seeking damages for breach of a talent agency contract.  
15 Garson v. Div. Of Labor Law Enforcement (1949) 33 Cal.2d 861,  
16 Robinson v. Superior Court (1950) 35 Cal.2d 379. The \$675,202.00  
17 advances to petitioner should be repaid. In addition, any profit  
18 gained by the respondent as a result of his illegal procurement  
19 activities must be disgorged to the petitioner.

20 13. The "1997 Agreement" contains a severability clause.<sup>13</sup>  
21 The California cases take a very loose view of severability,  
22 enforcing valid parts of an apparently indivisible contract where

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23 <sup>13</sup> Section 7(h) of the "1997 Agreement" states: "Should any provision or  
24 portion of this Agreement be held unenforceable or invalid for any reason by a  
25 court of competent jurisdiction, the remaining provisions and portions of this  
26 Agreement shall be unaffected by such holding and shall remain in full force and  
27 effect. If any provision of this Agreement or its application to any party or  
circumstance is restricted, prohibited, or unenforceable, such provision shall  
be ineffective only to the extent of such restriction, prohibition or  
unenforceability without invalidating the remaining provision of the Agreement  
and without affecting the validity or enforceability of such provision or its  
application to other parties or circumstances."

1 the interests of justice or the policy of the law (as the court  
2 conceives it) would be furthered. Carter Finance Co. (1949) 33 C.2d  
3 564, at 573. As the intent of both parties was to execute the  
4 "1997 Agreement" as a means to alleviate petitioner's \$675,202.00  
5 advances, as well as, petitioner's obligation to pay 20% of his  
6 gross earnings to respondent, the interest of justice require the  
7 intent be carried out.

8 14. The courts have held in the (1964) case of Keene v.  
9 Harling, that "where the consideration is only partly illegal and  
10 the agreement is severable, the legal portion may be enforced.  
11 Keene v. Harling (1964) 61 C.2d 318, 324

12 15. Similarly, if the contract has several distinct  
13 objects, of which at least one is lawful, the contract is valid and  
14 enforceable as to the lawful object, provided that this is clearly  
15 severable from the rest. C.C. 1599; Hedges v. Frink (1917) 174 C.  
16 552, 554. Here, the consideration received by the respondent is  
17 both legal in part and illegal in part. Any value received by the  
18 respondent over and above the advances, must be considered payment  
19 for services in lieu of commissions. The question becomes can we  
20 place a reasonable value on the minutes received by respondent to  
21 determine the actual monetary value of the consideration received.  
22 If so, it is then easy to sever what was legally collected as a  
23 loan repayment and what was illegally collected as payment for  
24 commissions derived from an illegal management contract. To hold  
25 otherwise would undermine the intent of the parties, result in an  
26 inequitable holding, produce an injustice and allow a contract to  
27 be enforced which violates public policy.

1           16. Here, the "1997 Agreement", provides for the value  
2 of the minutes.<sup>14</sup> Testimony reflected the value of the minutes  
3 contained within the agreement is grossly undervalued and yet  
4 again, another example of respondents' unfair self dealing and  
5 breach of fiduciary duty owed his client.

6           17. Rest.2d, Contracts §208, reads as follows:

7           "If a contract or term thereof is unconscionable at the  
8 time the contract is made a court may refuse to enforce the  
9 contract without the unconscionable term, or may so limit the  
10 application of any unconscionable term as to avoid any  
11 unconscionable result." In the "1997 Agreement" the respondent has  
12 arbitrarily given the petitioner credit of 7,000.00 a month in  
13 reduction of the debt, reflecting all minutes received during the  
14 month, regardless of the true value. This amount calculates at  
15 around \$44.00 a minute credit. Testimony and documentary evidence  
16 produced at the hearing placed fair market value for a one minute  
17 commercial on petitioner's show at \$350.00 to \$1,000.00 per minute.  
18 Calculations were entered into evidence placing actual value on  
19 each minute received by respondent over the applicable time period.  
20 The court will use those calculations, and substitute those values  
21 for Sect. 2 of the "1997 Agreement"

22           18. The respondent has violated the Talent Agencies Act,  
23

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24           <sup>14</sup> Section 2. of the "1997 Agreement" Reduction of Debt provides: "From  
25 March 1, 1997 through February 28, 2002, for each full month period that Renan  
26 provides to Unico the Commercial Time as agreed upon..., Renan shall be entitled  
27 to a credit of \$7,000.00 at the end of each month against the debt, no matter  
what the true value is of the Commercial Time provided to Unico... It is the  
intention of Renan and Unico that by using this method, Renan will satisfy his  
debt in full to Unico by February 28, 2007. Renan and Unico each bears the risk  
that the Commercial Time may be valued higher of lower than the amount of the  
credit given to Renan under this paragraph."

1 breached his fiduciary duty to his client and the result must  
2 reflect that violation.  
3

4 ORDER

5 1. For the above-stated reasons, IT IS HEREBY ORDERED  
6 that the "1995 Management Agreement" between respondent GERSHON  
7 GABEL dba UNICO TALENT MANAGEMENT INC., and petitioner RENAN  
8 ALMENDAREZ is void *ab initio*.

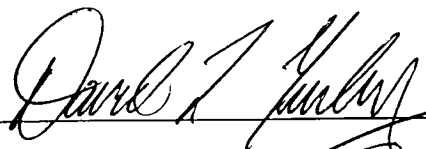
9 2. The "1997 Agreement" is held lawful in part as a loan  
10 repayment contract in the amount of \$675,202.00. The "1997  
11 Agreement" is held unlawful in part as to all value received in  
12 excess of \$675,202.00, which reflects unlawful commissions  
13 received.

14 3. In the interest of justice, the total fair market  
15 value for minutes received by the respondent are valued at  
16 \$946,302.00. The \$675,202.00 will be deducted from the total  
17 compensation received, and Respondent must pay petitioner the  
18 remainder in the amount of \$271,100.00 plus interest at 10% per  
19 annum from the date of the initial violation (March 1997), at  
20 \$67,750.00 for a total of \$338,850.00.

21 4. The respondent has no further enforceable rights  
22 under this contract.

23 IT IS SO ORDERED

24  
25  
26 Dated: 8/26/99

27   
DAVID L. GURLEY  
Attorney for the Labor Commissioner

1  
2  
3 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:  
4  
5

6  
7 Dated:

8/26/99

*Marcy Saunders*

MARCY SAUNDERS  
State Labor Commissioner

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL  
(C.C.P. §1013a)

(RENAN ALMENDAREZ v. UNICO TALENT MANAGEMENT, INC.; GERSHON GABEL)  
(TAC 55-97)

I, MARY ANN E. GALAPON, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102.

On August 26, 1999, I served the following document:

**DETERMINATION OF CONTROVERSY**

by facsimile and by placing a true copy thereof in envelope(s) addressed as follows:

EDWARD SABIN, ESQ.  
GREENBERG, GLUSKER, FIELDS,  
CLAMAN, & MACHTINGER, LLP  
1900 Avenue of the Stars, Suite 2100  
Los Angeles, CA 90067  
FAX: 310-553-0687

GITA SAIGAL, ESQ.  
GIRARDI AND KEESE  
1126 Wilshire Boulevard  
Los Angeles, CA 90017  
FAX: 213-481-1554

and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on August 26, 1999, at San Francisco, California.

  
MARY ANN E. GALAPON